IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.467 OF 2002

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1. Nimbus Creative Corporation Ltd.

2. Nimbus Communications Ltd. ....Petitioners

v/s.

1. Prasar Bharati Broadcasting
   Corporation of India,

2. Union of India, Ministry of Law,

3. The Secretary, Ministry of
   Information & Broadcasting

4. Directorate General, Doordarshan

5. The Director General, Doordarshan

6. The Controller of Sales, Doordarshan

7. The Director, Doordarshan Kendra ...Respondents

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Mr.Iqbal Chagla with Mr.S.K. Mukherjee for the Petitioners.

Mr.G.E.Vahanvati, Solicitor General with Mr.E.H. Bharucha & Mr.Sham Mehta i/b R.M. Azim for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 29th November,2004

P.C.:

1. This is the petition filed under Section 34 of the Arbitration & Conciliation Act challenging the award made by the sole arbitrator dated 5th July, 2002. By that award the learned arbitrator has directed the Petitioners to pay to the respondents an amount of Rs.7,62,41,798/- along with interest from 1st September, 1998. The petitioners were the claimant before the learned arbitrator and the claims were made by them against the respondents. In the

award the learned arbitrator has stated the facts in detail, therefore, I do not propose to repeat the facts which are narrated in detail by the learned arbitrator in the award. The dispute between the parties was about the charges that were payable by the petitioners for the telecast of their programme namely "Super Hit Muqabla". According to the respondent Prasar Bharti Broadcasting Corporation the agreed rate was Rs.51,00,000/- per episode, whereas according to the petitioners there was no agreement about the rate and that the petitioners were obliged to pay according to rate-card issued by the respondents, which was applicable from 1st November, 1996. The respondents were claiming Rs.51,00,000/- per episode also from 1st November, 1996.

2. The learned Counsel appearing for the petitioners submitted before me that the Respondents had gone to the arbitrator with the case that an agreement was reached between the parties on 1st November, 1996 that the petitioners would pay Rs.51,00,000/- per episode from 1st November, 1996. The learned Counsel submits that there is no evidence led by the respondents before the arbitrator that there was any meeting between the petitioners and the respondents on 1-11-1996. The learned arbitrator has also not found that there was any meeting held between the

petitioners and the respondents on 1-11-1996, still the learned arbitrator has answered issue No.3 in the affirmative. The learned Counsel submits that so far as meeting held on 28th August, 1996 is concerned, it was specific case of the respondents that in August, 1996 negotiations were going on between the parties and that at that time there was no concluded contract between the parties, still the learned arbitrator has recorded a finding that the rate of Rs.51,00,000/- per episode was fixed in the meeting held on 28th August, 1996. The learned Counsel submits that apart from the fact that this finding is contrary to the pleadings of the respondents, it is also contrary to the evidence that is placed on record. The learned Counsel submits that even the witness for the respondents has stated that final decision was not taken in the meeting held on 28th August, 1996. It is submitted that the rate card is issued by the respondents, so that uniform rate can be charged from all the persons who want to telecast their programmes. A departure can be made from the rate card, in case there is a contract to the contrary, but no contract to the contrary has been proved and therefore the learned arbitrator should have accepted the case of the petitioners that they ought to have been charged at the rate mentioned in the rate card. The learned Counsel submits that the figure of

Rs.51,00,000/- per episode was subject to rectification and was never accepted by the respondents. The figure of Rs.51 lakh per episode was also factually erroneous. The learned Counsel took me through the oral evidence as also the documents on the record and submitted that the findings recorded by the learned arbitrator are contrary to the material available on record. The learned Counsel submits that the petitioners had proposed that they may agree to pay at a higher rate per episode, if they are given extension for a period of two years. Their request for extension for a period of two years was not accepted. In stead they were given extension only for a period of one year. The learned counsel submits that payment at a rate higher than which is mentioned in the rate card was only possible if a longer period is given to the petitioners. The learned Counsel submits that it was a commercial venture and therefore forcing the petitioners to pay at a higher rate is totally uncalled for. The learned Counsel submits that as the findings recorded by the learned arbitrator are contrary to the material on record, they are liable to be set aside.

3. On the other hand, it was submitted on behalf of the respondents that the controversy whether the

petitioners had agreed to pay Rs.51 lakh per episode, cannot be raised by the petitioners in this petition in view of the stand taken by them before the learned arbitrator. Before the learned arbitrator, it was specifically argued on behalf of the petitioners that they are ready to pay at the rate of Rs.51 lakh per episode provided they are given extension for a period of two years. The learned Counsel submits that in view of the submission made before the learned arbitrator, the controversy whether the decision was taken in the meeting dated 28th August, 1996 or in the meeting held on 1st November, 1996 loses significance. The learned Counsel further submits that therefore the only question that was to be decided by the learned arbitrator was whether the respondents had agreed to give extension for a period of two years. The learned Counsel submits that up to January, 1997 all weekly contracts were filed by the petitioners on the basis of minimum guarantee of Rs.51 lakh. Up to January, 1997 these contracts were filed unconditionally. From February, 1997 the petitioners started making endorsement on the contracts that they are filing the contracts subject to their request for necessary rectifications in the amount of Rs.51 lakh by letters dated 15-11-1996 and 28-1-1997. It is further submitted that the petitioners were paying an amount of Rs.47 lakh each

week in stead of Rs.51 lakh, not because they were liable to pay the amount of Rs.47 lakh under the rate card, but because, according to them in arriving at the amount of Rs.51 lakh there is a calculation error committed by the respondents. It is submitted that the fact that the petitioners were claiming that there is a calculation error committed by the respondents in arriving at the figure of Rs.51 lakh shows that basically the petitioners had accepted that they are liable to pay not at the rate mentioned in the rate card. It is further submitted that though the respondents had agreed to grant extension only for a period of one year, the reason why letters were written to the petitioners by the respondents that a penal action may be required to be taken against them was for the reason that though there was a clear understanding between the parties for Rs.51 lakh per episode, the petitioners were not depositing that amount. The learned Counsel submits that this stand taken by the petitioners was contradictory and the petitioners were changing its stands from time to time according to their convenience.

4. In my opinion, after having gone through the record and after having heard the learned Counsel appearing for both sides at length and specially after finding that the learned arbitrator has

considered the evidence available on record and has recorded a finding which is essentially a finding of fact, the relevant question to be considered by me is whether this court should interfere with the finding of fact recorded by the learned arbitrator in its jurisdiction under Section 34 of the Arbitration and Conciliation Act. The Supreme Court in its judgment in the case of **Arosan Enterprises Ltd. v. Union of India, AIR 1999 SC 3804** has observed that in so far as findings of fact recorded by the arbitrator are concerned, the court hearing the petition under Section 34 of the Arbitration Act may disturb those findings only if the Court finds that the view that has been taken by the learned arbitrator is impossible view or that it is not possible to take such a view on the material that is available on record. I find that there is considerable force in the submission of the learned counsel appearing for the petitioners that the respondents had gone before the arbitrator with a case that the rate of Rs.51 lakh per episode was agreed to by the parties in the meeting dated 1-11-1996 and in fact no such meeting was held and still the learned arbitrator has answered issue No.3 in the affirmative. However, all the argument regarding finding recorded being contrary to the evidence on record in relation to existence or

otherwise of the contract between the parties in relation to fixation of Rs.51 lakh per episode is concerned, in my opinion, loses significance in view of the submission made on behalf of the petitioners before the learned arbitrator. In paragraph 19, the learned arbitrator has recorded following submissions made on behalf of the petitioners, which read as under:-

> "Mr.Mukerji then submitted that even though the programme could not continue for an indefinite period, doordarshan could not have discontinued to telecast before the expiry of period of two years commencing from November 15, 1996. It was argued by the learned Counsel that in the meeting between the officers of the Respondents and Harish Thawani held on August 26, 1996 assurance was given of rate protection of two years and on such assurance, the Claimants agreed to pay the Minimum Guarantee of Rs.51 lakhs per episode. The learned Counsel submitted that grant of rate protection for duration of two years clearly indicates that the programme would be telecast for a duration of two years."

5. I do not find a ground raised in the petition that the learned arbitrator has wrongly recorded this submission as made on behalf of the petitioners. It is clear from the above submission that even according to the petitioners they had accepted the rate of Rs.51 lakhs per episode in the meeting held on 28th August, 1996 on an assurance given by the respondents that rate protection of two years would be granted. By letter dated 8-11-1996 the petitioners were informed that the petitioners have to pay Minimum Guarantee of Rs.51 lakhs per episode from 15-11-1996. In this letter dated 8-11-1996, it is not mentioned as to what is the duration for which this rate is to continue. In reply to the letter dated 8-11-1996 the petitioners wrote a letter dated 14-11-1996. Paragraphs 8, 9 and 12 of that letter are relevant. They read as under:-

> "(8) Hence we have been willing to take the hit on this account provided there appears to be a long term potential, on the basis of which advertisers' incentives can be planned by us.
>
> (9) We had therefore proposed a 2 year rate

protection if a revised MG deal was to put into effect.

(12) We therefore request you to kindly confirm that the proposed revised MG terms would be applicable for a period of 2 years from 15 November 96.

6. By letter dated 15-11-1996, the petitioners informed the respondents that in arriving at the amount of Rs.51 lakhs they have committed calculation mistake and the amount really comes to Rs.47,40,000/-. The Respondents informed the petitioners by letter dated 14-2-1997 that their programme has been granted extension for a period of one year from 15-11-1996. Thus, the respondents for the first time informed the petitioners that the programme has been granted extension only for a period of one year by letter dated 14-2-1997. The learned arbitrator after considering the evidence on record has come to the conclusion that initially the Petitioners were claiming extension only for a period of one year and that the demand for extension of two years was merely an after thought. In my opinion, one more aspect requires to be considered

in this regard. It is not in dispute that the petitioners were required to submit a weekly contract. It is clear from the arguments before the learned arbitrator as also the correspondence that the Petitioners had agreed to the minimum guarantee of Rs.51 lakhs per episode. Subsequently, it claimed that there was some calculation mistake in arriving at that amount, but that calculation mistake was based on the rate mentioned in the rate card. In my opinion, therefore, there was no justification for the petitioners to pay amount of only Rs.47,40,000/- per week and not full amount of Rs.51,00,000/-. In my opinion, if the petitioners had agreed for Rs.51 lakh per episode only on the condition that they are given two years extension, then as the period of extension was not communicated to them in November, 1996, they ought not have acted on the contract. In my opinion, the finding of the learned arbitrator that agreement was for only one year extension , in my opinion, is a finding which is possible to be recorded on the basis of the material that is available on record. It is further to be seen here that the letters were written by the respondents to the petitioners for discontinuation of the telecast of their programme "Super Hit Muqabala", because of the conduct of the petitioners of depositing only Rs.47,40,000/- per week and not

the agreed amount of Rs.51 lakhs. In my opinion, had the respondents agreed to two years' extension to begin with then also the respondents were justified in discontinuing the programme for this conduct of the petitioners of not depositing full agreed amount of Rs.51 lakhs despite repeated reminders issued by the respondents.

7. Taking overall view of the matter, therefore, in my opinion, it would not be appropriate to disturb the award made by the learned arbitrator , specially because I find that the findings recorded by the learned arbitrator are of findings of fact and I find that on the basis of the material that is available on record it is a possible view.

8. In the result, therefore, the present petition fails and is dismissed. Petitioners shall pay costs of this petition to the respondents as incurred by the respondents.

Parties to act on ordinary copy of the order duly authenticated by the Associate/ Personal Secretary of the court as a true copy.

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